Supreme Court, U.S.
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No. 98-650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

NITRAM, INC., INDUSTRIAL RISK INSURERS, BARNARD & BURK GROUP, INC., BARNARD AND BURK ENGINEERS & CONSTRUCTORS, INC., ISI, INC., AMERICAN HOME ASSURANCE CO.,

Petitioners,

vs.

MAN GUTEHOFFNUNGSHÜTTE GmbH,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should review the court of appeals' holding that, for purposes of federal court proceedings to confirm an international arbitral award, the district court's review should be governed by Chapter 2 of the United States Federal Arbitration Act (9 U.S.C. §§ 201-208) and the international treaty which it adopts, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, rather than by either the laws of the State of Florida or the arbitration rules of the American Arbitration Association?

2. Whether this Court should review a single fact-specific evidentiary ruling made by an international commercial arbitration panel and upheld by the federal courts during subsequent proceedings which confirmed the international arbitral award pursuant to Chapter 2 of the United States Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

LIST OF ALL PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding except that: (1) Nitram, Inc., which is listed only in the caption, should be dismissed as a petitioner because it has no interest in this matter; and (2) the petitioners' list neglects to include the name of the respondent which is MAN Gutehoffnungshütte GmbH.

Pursuant to Supreme Court Rule 29.6 the parent company of the respondent, MAN Gutehoffnungshütte GmbH, is MAN AG. There are no nonwholly owned subsidiaries of respondent.

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Respondent MAN Gutehoffnungshütte GmbH ("MAN GHH") respectfully submits this brief in opposition to the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. The petition raises no issues that merit plenary review.

COUNTERSTATEMENT OF THE CASE

This proceeding arises from an amended final judgment in which the district court confirmed a series of three arbitration awards issued in 1993 by an international commercial arbitration panel of the American Arbitration Association. The arbitration dealt with numerous claims and disputes which arose between the parties during the course of the design and construction of a major modification and expansion project for a nitric acid fertilizer plant near Tampa, Florida. The project began in 1983, was completed finally during 1985, and spawned complex federal court litigation commencing in 1985 and related international arbitration which began several years later.

The arbitration claims focused on the design, fabrication, and construction of a high-temperature, high-pressure "tail" or waste gas process piping system and the design, fabrication and installation of a large energy-recovery turbine known as a "tail gas expander" at the nitric acid plant. The tail gas expander, which was manufactured by the respondent, is installed on a structural steel and concrete foundation pedestal in the nitric acid plant as part of a "train" or row of other pieces of machinery connected to one another such as, for example, a large air compressor. The expander turbine is connected at each end to the waste gas process piping designed and constructed by the petitioners and the hot tail gas from the nitric acid manufacturing process flows through the expander driving its rotor. The mechanical energy generated from the process is used to power other equipment in the plant thereby reducing

the plant's dependence on other power sources such as electricity, reducing costs and increasing operating efficiency.

The arbitration proceedings spanned almost three years. Following extensive preliminary proceedings including exchanges of large quantities of documents, the arbitration culminated in twenty-two days of hearings before the arbitration panel that were held in Tampa over two different sessions during January and March of 1993.[1]

As can be seen from the first "Award of Arbitrators" of May, 1993, a unanimous panel rejected the petitioners' claims completely concluding, as a matter of fact, that the "wrecks" of the turbine equipment during attempts to start up the nitric acid plant in January and March of 1985 both had been caused solely by the defectively designed and constructed process piping system connected to the turbine. Pet. App. D at 52a.[2] Accordingly, the panel dismissed the petitioners' claims (including the insurers' subrogation claims), concluded that the petitioners had refused wrongfully to pay MAN GHH for three invoices for additional work that had been ordered by the various petitioners on the fertilizer plant project and currency exchange losses due to late payments, and awarded MAN GHH its costs for the arbitration.

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1. The case between MAN GHH and the petitioners was heard and decided by three international arbitrators selected by the parties under the auspices of the American Arbitration Association. The panel consisted of, as chairman, a senior Canadian trial lawyer (a designated "Q.C." or Queen's Counsel and an experienced arbitrator), and two engineers, one a Ph.D. in mechanical engineering from India and the other a rotating equipment engineering specialist from Great Britain.

2. References to "Pet. App." refer to the Appendix filed by the petitioners as part of their petition in this matter.

The losing parties in arbitration filed several motions to vacate the arbitral awards in the district court. On September 23, 1993, MAN GHH filed its petition to confirm the final arbitral awards in its favor. On March 23, 1994, the district court entered its order which both denied the various motions to vacate the arbitrators' awards and granted MAN GHH's petition to confirm. In its opinion, the district court rejected the petitioners' claims that there was no evidentiary basis for the arbitrators' awards, that the arbitrators had acted "arbitrarily, irrationally and capriciously" in admitting various evidence (including the so-called "TÜV" report), and that the awards violated public policy. *See Nitram, Inc. v. Industrial Risk Insurers*, 848 F. Supp. 162 (M.D. Fla. 1994), *aff'd sub nom., Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998); Pet. App. C at 40a.

On appeal, the United States Court of Appeals for the Eleventh Circuit again rejected the petitioners' claims that the procedures observed by the arbitrators were not in accordance with the rules of the American Arbitration Association and the agreement of the parties, that the awards violated public policy, and that the arbitrators did not conduct a "fundamentally fair" hearing. *See Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998); Pet. App. A at 1a. Petitioners requested a rehearing, raising largely the same issues advanced in their petition, which the Eleventh Circuit denied without comment.[3]

In their petition, the petitioners contend that an international arbitration panel's decisions to admit a technical engineering report and to allow testimony concerning this report resulted in a denial of their procedural due process rights. As

3. The petition for rehearing was denied by the court of appeals in an order dated July 23, 1998. The petition for writ of certiorari indicates an incorrect date of August 23, 1998.

detailed below, there is no cause for this Court's review of the petitioners' factbound contention which has been rejected now by the arbitration panel, the district court, and the United States Court of Appeals for the Eleventh Circuit. Substituting hyperbole about "an unfair and prejudicial proceeding" and the like for an accurate description of the underlying facts, the petitioners have distorted the procedural history of this case.

The evidentiary record from the arbitration is substantial, consisting of 325 composite exhibits containing over 10,000 pages, deposition transcripts for over forty witnesses, and hearing transcripts for some twenty witnesses who appeared live to testify before the panel. Out of this sea of paper, the petitioners have now focused their challenge to the lower courts' confirmation of the international arbitral award exclusively on the arbitration panel's decision to admit into evidence a single technical report, the so-called TÜV report.[4] Putting aside the fact that the Award of Arbitrators, Pet. App. D at 52a, does not even mention, much less rely on, the TÜV report, the petitioners have fundamentally mischaracterized the circumstances surrounding the arbitrators' decision to admit the report into evidence during the arbitration hearing.

In particular, the petitioners have contended that MAN GHH did not timely produce the TÜV report, as required it is asserted by a pre-hearing order of the arbitration panel. While it is correct that the petitioners' counsel did not review the report and request a copy of it until January 8, 1993 — the Friday before the Monday when the arbitration hearings began — the arbitration panel, the district court, and the United States Court of Appeals for the Eleventh Circuit all heard and rejected

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4. MAN GHH would note that, apparently, the petitioners have abandoned any argument concerning the admission of the testimony of Donald Hansen, a specialist in pipe stress analysis who was called as a witness by the arbitration panel to testify at the arbitration hearing.

completely the petitioners' argument that the admission of the TÜV report during the arbitration violated the panel's prior order.[5] Thus, there is simply nothing in the record to support the petitioners' claim or assumption that orders of the arbitration panel were "violated," thereby possibly constituting a denial of due process.

The petitioners' presentation of the procedural history of this matter also conveniently ignores the timing issues. The TÜV report was not admitted into evidence by the arbitration panel until March 26, 1993, well over two months after it had been provided to the petitioners. Indeed, the petitioners never requested a continuance from the arbitration panel in order to prepare any response to the TÜV report. Instead, as noted by both the district court and the court of appeals, the petitioners had "ample opportunity" to prepare for and rebut the document in question. The record in this matter reflects that the petitioners were allowed to cross-examine various witnesses during the arbitration hearings about the TÜV report and also presented expert witnesses of their own for rebuttal purposes.

A central premise of the petitioners' arguments to this Court is the petitioners' assertion that the Eleventh Circuit's opinion expresses its refusal to recognize the applicability of due process principles in the international arbitral proceeding in this matter. However, the text of the Eleventh Circuit's opinion explicitly refutes the petitioners' position. To begin with, the Eleventh Circuit recognized that arbitration proceedings "need provide only a fundamentally fair hearing." *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1443 (11th Cir. 1998). Indeed, this is the very language used by the

5. "We hold that the admission of the TÜV report was in accordance with the AAA rules and therefore with the agreement of the parties." *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1443 (11th Cir. 1998).

petitioners. The Eleventh Circuit also discussed the petitioners' arguments that, "the proceedings were fundamentally unfair" and indicated that the availability of this defense was "an open question." *Id.* at n.11. However, the Eleventh Circuit considered the petitioners' due process arguments on the merits, stating,

> [w]e need not decide this question, however, because it is apparent that the admission of Hansen's testimony and the relatively late provision of the TÜV report did not render the proceedings fundamentally unfair.

Id. Thus, contrary to the petitioners' statement of the case to this Court, the Eleventh Circuit did consider the petitioners' due process arguments but found them to be meritless.

REASONS FOR DENYING THE WRIT

The unanimous opinion below involved nothing more than the court of appeals' approval of the district court's decision to confirm an international arbitral award in a dispute between several United States companies and their insurers on the one hand and a German-based equipment manufacturer on the other. Petitioners present several issues, none of which is worthy of certiorari, for reasons that can and will be stated in short order. In essence, the petitioners raise merely case specific factual issues which are not of general importance and do not present any conflict among the circuits or with any of this Court's decisions. This is nothing more than a challenge by the losing parties in arbitration to the arbitration panel's ruling to admit a single document into evidence, parties who subsequently aired their arguments fully first at the district court then at the court of appeals losing on both occasions. The petition is bereft of anything that would suggest any "special and important reasons" for the Court to review this case. For all of these reasons, the Court should deny the petition.

I.

THE PETITIONERS' CLAIM THAT A FEDERAL COURT'S REVIEW OF AN INTERNATIONAL ARBITRAL AWARD RENDERED IN THE UNITED STATES SHOULD BE GOVERNED BY EITHER FLORIDA STATE LAW OR THE RULES OF THE ORGANIZATION WHICH ADMINISTERED THE ARBITRATION DOES NOT MERIT REVIEW BY THIS COURT.

For the first time in the federal court confirmation proceedings which have followed the international arbitration, the petitioners have advanced the novel argument to this Court that, when determining whether to confirm or vacate an international arbitration award, the federal courts ought to be governed in their review not by either the Federal Arbitration Act or the New York Convention but, rather, the courts should evaluate the arbitrators' conduct of the arbitration proceedings and their arbitral decision by applying only the rules of the American Arbitration Association and the laws of the State of Florida. Not surprisingly, the petitioners fail to cite a single United States court decision to support their claim that the court of appeals erred in holding in this case that, in reviewing an international arbitral award made in the United States, a federal court should be guided by the principles of Chapter 2 of the Federal Arbitration Act and the treaty which Chapter 2 incorporates into United States law, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known commonly as the "New York Convention."[6]

While it is correct, as petitioners assert, that this Court has not had the occasion to address the relationship of the New

6. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3.

York Convention to Chapter 2 of the Federal Arbitration Act and their applicability to the enforcement of a specific international arbitral award, the petitioners have neglected to acknowledge that the court of appeals' decision in this matter applying the New York Convention is consistent with and not in conflict with the decisions of the other circuits which have addressed the issue. The First, Second, Seventh and Ninth Circuits previously and now the Eleventh Circuit all have held that the New York Convention and Chapter 2 of the Federal Arbitration Act govern the enforceability of those arbitral awards which involve at least one party which is domiciled or has their principal place of business outside of the United States. *See Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983); *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 18-19 (2d Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1042, 140 L. Ed. 2d 107 (1998) (Second Circuit held that New York Convention and, thus, Chapter 2 of the Federal Arbitration Act both applied to arbitral award issued by the American Arbitration Association in a dispute involving one United States corporation and two non-United States parties); *Jain v. de Méré*, 51 F.3d 686, 689 (7th Cir.), *cert. denied*, 516 U.S. 914, 116 S. Ct. 300, 133 L. Ed. 2d 206 (1995); *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.*, 887 F.2d 1357, 1362 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016, 110 S. Ct. 1319, 108 L. Ed. 2d 494 (1990) (the New York Convention applies to those arbitral awards which arise from a legal relationship which is commercial and *not* entirely domestic in scope); and *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982).

Despite the petitioners' suggestion to the contrary, it has never been argued by the respondent herein (or any other party to these proceedings) nor has it been held by either of the courts below that Chapter 2 of the Federal Arbitration Act is the "sole" basis of the federal courts' subject matter jurisdiction in this

matter. Rather, although arguably the federal courts also have federal subject matter jurisdiction due to the parties' diversity of citizenship and the amount in controversy, there is little doubt that the court of appeals was correct in holding here that, pursuant to 9 U.S.C. § 203, the district court had original jurisdiction over this matter, regardless of the amount in controversy, because as a proceeding to enforce an international arbitral award, the matter arose under the New York Convention.[7] As such, the federal courts are obligated to review and either confirm or vacate the international arbitral award according to the standards of Chapter 2 of the Federal Arbitration Act and the New York Convention. There is absolutely no authority to support the petitioners' contention that the court of appeals should have ignored the standards of the Federal Arbitration Act and the New York Convention and judged the arbitration proceedings against some unspecified standards which perhaps are set by Florida state law. Simply put, any Florida state arbitration law — and the rules of the American Arbitration Association — are clearly inapplicable to a federal court's limited role in proceedings to confirm an international arbitral award as they are preempted by applicable United States federal law including the New York Convention.

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7. 9 U.S.C. § 203 provides:

> An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

II.

THE DECISION OF AN INTERNATIONAL ARBITRATION PANEL TO ADMIT ONE DOCUMENT — AMONG MANY — INTO EVIDENCE DURING THE ARBITRATION HEARING DOES NOT MERIT REVIEW BY THIS COURT.

The petition's factbound claim that the international arbitration panel's decision to admit a single piece of documentary evidence violated the panel's own earlier pre-hearing procedural order does not warrant review by this Court. At its core, the petitioners' argument is that the arbitrators wrongly decided the facts in this complex case concerning very technical mechanical engineering issues. The unanimous opinion of the court of appeals below involved nothing more than a decision to enforce an international arbitral award and was a plainly correct application of settled due process law. No conflict among the circuits on the application of due process principles in New York Convention international arbitration cases is even claimed by the petitioners. Indeed, the petitioners have not cited even one case in support of their "due process" argument.

Although the petitioners have attempted to portray this case as presenting substantial due process questions, the petition essentially seeks review of factual determinations made by the international arbitration panel which were confirmed by both the district court and the Eleventh Circuit. These routine factual determinations made by the arbitrators included interpreting the requirements of the arbitration panel's own pre-hearing orders, considering the amount of time between the production of the TÜV report to the petitioners and its admission into evidence, analyzing the availability of opportunities for the petitioners to prepare for and rebut the TÜV report, and resolving the materiality of the TÜV report. Likewise, despite

the petitioners' claim to the contrary, it is clear that the Eleventh Circuit in fact considered but rejected the petitioners' due process arguments on the merits. However, the petitioners disagree with the Eleventh Circuit's application of due process principles to the facts of this case or, perhaps, simply hope for a different outcome.

The petition implies there is a lack of case law concerning the applicability of due process principles to international arbitration cases arising under the New York Convention, as in this matter.[8] To the contrary, courts have held consistently that international arbitral awards may be challenged on due process grounds. *See, e.g., Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123 (7th Cir. 1997) (arbitrator's limitation on cross-examination of witness did not amount to a denial of due process); *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141 (2d Cir. 1992) (arbitration panel's decision to exclude certain crucial evidence when the panel had indicated earlier it would accept the evidence was denial of due process); *Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie du Papier (RATKA)*, 508 F.2d 969 (2d Cir. 1974); *National Oil Corp. v. Libyan Sun Oil Co.*, 733 F. Supp. 800, 813-16 (D. Del. 1990) (arbitration panel's admission of false and misleading testimony did not amount to a denial of due process, especially where party was able to present all of its arguments against consideration of evidence to the panel). Thus, there is simply no need for clarification by this Court concerning the applicability of due process principles to international arbitral awards which are submitted to the federal courts in the United States for confirmation.

Finally, the petition cites no authority which would even suggest, much less hold, that the arbitration panel's decision to

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8. Petitioners have conceded that this case arises under the New York Convention. (Pet. 5-6).

admit the TÜV report might amount to a denial of due process. Indeed, the petition does not cite any due process cases arising from the arbitration context. In particular, as the Eleventh Circuit noted in this case, it is axiomatic that, "[a]n arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence." *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1443-44 (11th Cir. 1998). Thus, although an arbitrator must provide a fundamentally fair hearing with adequate notice, a hearing on the evidence and impartial decision-making, "parties that have chosen to remedy their disputes through arbitration rather than litigation should not expect the same procedures they would find in the judicial arena." *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997).

Indeed, there is not one case in the Eleventh Circuit or elsewhere (certainly the petitioners have not cited to any) in which a federal court has vacated an arbitral award because the panel accepted evidence that one party wanted the panel to exclude and not consider. But see, *Hayne, Miller & Farni, Inc. v. Flume*, 888 F. Supp. 949, 952 (E.D. Wis. 1995) (court notes, "the improper admission of evidence does not warrant vacation of the arbitration award"). Even if petitioners' factual assertions were accurate — which they are not — the arbitration panel's evidentiary rulings could not result in a denial of due process since the petitioners had the opportunity to object to the evidence before the panel and received limited judicial review thereafter. Indeed, even in cases arising under Chapter 1 of the Federal Arbitration Act, courts have refused to vacate arbitral awards due to the arguably untimely production of documents to be used at the arbitration hearing. *See, e.g., Trans Chem. Ltd. v. China Nat'l Mach. Import & Export Corp.*, 978 F. Supp. 266, 303-06 (S.D. Tex. 1997); *see also Mantle v. Upper Deck Co.*, 956 F. Supp. 719, 736-38 (N.D. Tex. 1997). Thus, the

the petitioners are seeking to invent due process "rights" which are unfounded under settled law and sound policy, and their effort to do so here does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the respondent MAN Guttehoffnungshütte GmbH respectfully submits the petition should be denied.

Respectfully submitted,

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